

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

HANI SALEH RASHID ABDULLAH, <i>et al.</i>,)	
)	
Petitioners,)	
)	
v.)	No. 05-CV-0023 (RWR)
)	
GEORGE W. BUSH, <i>et al.</i>,)	
)	
Respondents.)	
<hr/>)	

**JOINT STATUS REPORT ON CASE MANAGEMENT ISSUES
PURSUANT TO COURT’S INSTRUCTION**

In accordance with this Court’s Minute Entry dated December 3, 2008, the parties respectfully submit this joint status report in compliance with the Court’s instruction and to note Petitioner’s and the Government’s current position concerning the case management procedures that should govern this matter.

On November 18, 2008, the Government moved for clarification and reconsideration of Judge Hogan’s November 6, 2008, Case Management Order (“CMO”), or in the alternative, for certification of the CMO for appeal pursuant to 28 U.S.C. § 1292(b). *See* Dkt. 146 in Civ. No. 05-CV-0023. On November 21, 2008, Judge Hogan stayed certain aspects of the parties’ obligations under his preliminary CMO, and Judge Hogan’s Order was entered for the above-captioned case on this same date. *See* Dkt. 151. Judge Hogan conducted a hearing on the Government’s motion for clarification and reconsideration on December 10.

On December 16, 2008, Judge Hogan issued an Order granting in part and denying in part the Government's motion for clarification and reconsideration ("December 16 Order"). Dkt. 170. The December 16 Order revised the CMO's provision regarding disclosure of exculpatory evidence, modified the required "automatic discovery" disclosures, modified the disclosure requirement regarding classified materials produced in accordance with the Government's exculpatory evidence or automatic discovery obligations, and modified the deadlines for filing the Petitioner's traverse. *See id.* at 2-3. Judge Hogan also adjusted the deadlines for filing unclassified factual returns, lifted the stay entered by his November 21 Order, and ordered that any future motions to amend the Case Management Order be directed to the Merits Judges. *See id.* at 2, 4.

On December 17, 2008, Judge Hogan issued an Order ("December 17 Order") requiring joint filing regarding consolidation of petitions. Dkt. 171 in Civ. No. 05-CV-0023. The December 17 Order directs the parties to confer and, by Monday, January 5, 2009, submit a joint filing that identifies petitions that may, based on the similarity of the factual issues involved, be consolidated for merits proceedings. *See id.* at 1-2.

A. Government's Position

The Government is reviewing Judge Hogan's December 16 Order and is consulting with its agency clients to determine both our ability to comply with the revised Case Management Order and whether it is necessary to seek further modifications from this Court. The Government had previously stated its concerns with respect to the November 6, 2008 CMO, both in its November 18, 2008 motion for reconsideration and clarification and in this matter on November 26, 2008 in Respondents' Memorandum in Response to Court's Order of November 6, 2008 ("Respondents' November 26 Memorandum"). *See* Dkt. 163. Although the

December 16 Order granted some of the relief requested by the Government, it denied other requests, and the Government is not in a position at this writing to state what other modifications, if any, may be necessary. We anticipate, however, that after consulting with the affected agencies counsel will be in a better position to discuss these issues at the status conference to be scheduled in this matter.

The Government has, however, identified three specific issues that can be brought to the Court's attention today. First, the Government respectfully notes that it is in the process of evaluating whether it will be able to comply with the December 30 deadline put in place by Judge Hogan's December 16 Order for the production of exculpatory evidence in all coordinated cases in which factual returns have already been filed. Second, and on a related point, given Judge Hogan's order that further motions to amend the CMO be directed to the Merits Judges, the Government anticipates that a similar situation may occur frequently in the future -- i.e., that individual case management orders from the Merits Judges may lead to significant deadlines being imposed in large numbers of cases essentially simultaneously. As explained in Respondents' November 26 Memorandum, the imposition of simultaneous, unstaggered deadlines will make impracticable the Government's compliance with all of its obligations to all of the judges on this Court. *See* Dkt. 153 at 6-7. In order to ensure that its obligations in all of these habeas cases are met without compromising its interests, the Government had requested that Judge Hogan schedule proceedings for 25 cases per month. *See id.* Given that Judge Hogan did not address such sequencing in the December 16 Order, the Government expects to request that the individual Merits Judges adopt a sequencing approach to the cases pending in their courts.

Finally, pursuant to the December 17 Order, the Government has identified this petition as an appropriate candidate for consolidation with the following petitions (in which the detainee is identified by ISN): 836 (Civil Action No. 06-1765); 837 (04-1194); 838 (08-1238); 839 (04-1194); and 840 (05-2186). The Government believes that these petitions involve common issues of fact and that litigating them together will be most efficient for the court and the parties. Pursuant to Local Rule 7(m), the Government is conferring with counsel.

The government is available for a status conference the weeks of January 12, 2009, and January 19, 2009.

B. Petitioner's Position

Beginning with the last item first, Abdullah cannot presently determine if he opposes or consents to the consolidation suggested. The reason is that, although counsel for the parties have conferred, respondents were unable to state what issues might be consolidated, before whom, nor identify over non-secure telephone, what common nexus of facts warrant, in their view, consolidation. Necessarily in light of this respondents were unable to state why they believe such "common" issues predominate over individual inquires. Thus at this moment, petitioner Abdullah has no position on consolidation, although he notes the various peculiarities of the status of his proceeding involving evidence destruction and the like which would require individual attention.

Most of the points earlier made in respect of the first Case Management Order still stand. But the matter of the respondents' duty to turn over exculpatory evidence requires special remark. The government has not receded from its view of when a piece of exonerating evidence must be turned over. That is, they apparently insist, for example, that if their files contain an iron-clad *alibi* defense for a prisoner as to a particular event, such is not exculpatory

because the government did not rely on it. This astonishing view cannot be allowed to persist.

We also note the general tone of the respondents' submission above: namely that they arrogate to themselves production of information and scheduling matters even where, on reconsideration, Judge Hogan has not agreed with them. Such anticipatory self-help is obnoxious. In this connection, Abdullah sees no need a formal arrangement of tranches of cases. This case should be scheduled as all other civil cases are scheduled: with due regard for the schedules of counsel and parties, but, as the Supreme Court has directed, as promptly as possible under all the circumstances.

While nothing in the amended CMO prevents the filing of written discovery requests probing the respondents' compliance with the automatic discovery and exculpatory turnover obligations (or any matters on the merits), a therapeutic provision expressly allowing such should be added. Abdullah notes that he has two discovery related motions that are now ripe for decision.

Finally, Abdullah notes that Judge Huvelle has recently ordered the government to provide, in at least one of the Guantanamo cases before her,

an amended statement of facts on or before December 31, 2008. The amended statement of facts shall present, in numerical form, a short statement of each material fact upon which the government intends to rely in making its case-in chief, and it shall identify all evidence the government expects to elicit in support of those facts, including the names of any witnesses the government intends to call. If the government intends to rely on any statements in making its case-in-chief, it shall disclose on or before December 31, 2008: (1) the identity of the speaker; (2) the content of the statement; (3) the person(s) to whom the statement was made; (4) the date and time the statement was made or adopted; and (5) the circumstances under which such statement was made or adopted (including the location where the statement

was made). If the government cannot identify the original source or any later source of the information, it must so indicate.

Order of December 19, 2008, *Al-Mithali v. Bush*, No. 05-2186. A similar document in Abdullah's case would likely prove useful to the parties and the Court.

Dated: December 23, 2008

Respectfully submitted,

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